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BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION,

Petitioners,

v.

DIVISION OF OIL, GAS, & MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,

Respondent/Intervenors.

PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR LEAVE TO CONDUCT DISCOVERY

Docket No. 2009-019

Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**") by and through counsel and pursuant to Utah Administrative Code R641-105-300 submits this PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR LEAVE TO CONDUCT DISCOVERY in the above-captioned formal adjudicative proceeding before the Utah Board of Oil, Gas & Mining ("the Board"). Petitioners have not demonstrated that good cause exists under this Board's Rules to conduct any of the discovery proposed. Moreover, Petitioners are incorrect that the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") upon which the Utah Coal Program is based, provides any unconditional "right" to discovery in an administrative review such as this. Accordingly, Alton urges the Board to deny the Motion and proceed to a hearing on the merits of Petitioner's allegations.

ARGUMENT

This Board should reject Petitioners' Motion for Discovery because Sierra Club has not shown that good cause for any discovery exists. The Board should look to its own sound discretion in determining whether petitioners have demonstrated good cause, applying factors including or similar to those expressed in its Procedural Order for this matter. See Order Concerning Scope and Standard of Review 5–6, Bd. of Oil, Gas & Mining No. 2009-019 (Jan. 13, 2010). The following sections explain that (1) a 1979 interpretive comment to a federal rule does not trump the Board's good cause criterion for determining whether discovery should be available to Sierra Club in this matter; and (2) the nature of Sierra Club's allegations, rooted in the alleged absence of information from the permit application, does not support its proposed discovery requests.

I. NEITHER SMCRA NOR ITS IMPLEMENTING FEDERAL REGULATIONS PROVIDE AN UNCONDITIONAL "RIGHT" TO DISCOVERY IN A PERMIT REVIEW HEARING BEFORE THIS BOARD

Whether to permit Petitioner's to engage in discovery against either Alton or the Division should be determined according to Utah law, particularly the Board's "good cause" rule. Under the federal SMCRA, when a state regulatory program has been approved by the Secretary of the Interior, authority to administer the process for granting permits and reviewing permit decisions rests with the state regulatory agency, which acts according to state law. See In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 519 (D.C. Cir. 1981) ("Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role.") Federal regulation and state regulation under SMCRA are mutually exclusive, so that while the Secretary is authorized to set criteria for approval of a state program, once the program is approved, provisions of state, not federal law, are binding on applicants, operators, and interested parties until the Secretary rescinds his approval.[1]

> In sum, because the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously. Thus, after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the "blueprint" against which to evaluate the State's program, "drop out" as operative provisions. They are reengaged only following the instigation of a § 1271 enforcement proceeding by the Secretary of the Interior.

Bragg v. West Virginia Coal Ass'n, 248 F.3d 275, 289 (4th Cir. 2001.)

[1] Contrary to Petitioners' suggestion based on a Virginia Court of Appeals decision, Congress did not intend to supercede or preempt any state law or regulation unless it is inconsistent with SMCRA. 30 U.S.C. § 1255(a). If the Secretary finds any State law or regulation to be inconsistent, he must formally identify it. Id. at § 1255(b).

In order to receive approval, a state program must be "no less stringent than" SMCRA, and "no less effective" than federal regulations in meeting the requirements of SMCRA. 30 C.F.R. §§ 730.11(a), 730.5(a),(b). Neither the federal statute nor the Secretary's regulations require consistency with agency interpretive material such as regulatory preambles appearing in the Federal Register.

This Board's Rules of Practice, including its "good cause" discovery rule, are fully consistent with SMCRA and no less effective than federal regulations. Utah's State program was approved by the Secretary of the Interior on January 21, 1981. Conditional Approval of the Permanent Regulatory Program Submission from the State of Utah, 46 Fed. Reg. 5,899 (Jan. 21, 1981) (codified at 30 C.F.R. § 944.10(a)). The approval necessarily included an explicit finding that Utah's Program met the Department's criteria for approval. Id. at 5,912. Even more specifically, the Secretary found that provisions of the Utah program applying the Board's Rules of Practice and Procedure "meet the federal requirements for discovery, intervention and award of attorney's fees." Id. at 5,910. The Secretary subsequently approved Utah's use of the Board's Rules of Practice when the Coal Program revised its rules in 1990 to incorporate the provisions of the Utah Administrative Procedures Act, and again in 1992 when the coal rules and Board Rules of Practice were renumbered. See 30 C.F.R. § 944.15(n),(s); Utah Permanent Regulatory Program, 55 Fed. Reg. 13,773, 13,783 (Apr. 12, 1990); 57 Fed. Reg. 20,051, 20,052 (May 11, 1992). In each of those instances, the Board rules in effect included the rule for discovery upon a showing of good cause that now appears at R641-108-900. Utah Admin. Code R619-108-900 (1987) (See Exhibit A, attached. This 1987 version of the Board's Rules of Practice is apparently the earliest in the Division's possession. A search at the Department of Administrative rules did

not yield any older versions.) On no occasion in nearly thirty years of oversight and rule approvals has the federal Office of Surface Mining suggested that the Utah Board's rule providing for discovery on a showing of good cause was incompatible with the federal statute or rules.

Sierra Club's reliance on a 1979 regulatory preamble to OSM's rules for approving state regulatory programs is misplaced. In acting on its comment that a state program must provide a "right" to discovery, OSM implemented the "right" to discovery by revising its proposed rule to provide that the officer presiding at a state regulatory agency's administrative review proceeding must be empowered to compel discovery. Permanent Regulatory Program: Final Rule, 44 Fed. Reg. 14,902 (Mar. 13, 1979) (compare pages 15,104–105, cited by Sierra Club, with page 15,382 announcing the final rule. See Exhibit B, attached.) Sierra Club's interpretation of the 1979 language goes too far. It overreaching interpretation would impose on this Board a requirement for unfettered discovery that OSM itself declined to impose when it simply stated that in order to receive initial program approval state tribunals hearing permit appeals *may* compel discovery. To the extent that this rule creates a present mandate for this Board, it is fully satisfied by the Utah Administrative Procedures Act ("UAPA"), which provides that power to compel discovery according to agency rules. Utah Code Ann. § 63G-4-205(1). Agency rules that grant a limited right of discovery upon showing of need or other factors are consistent with UAPA. See Petro-Hunt, LLC, v. Dep't of Workforce Serv., 2008 UT App 391 ¶ 13.

In sum, Sierra Club's argument based on the 1979 preamble that it is entitled to a discovery limited only by the Rules of Civil Procedure is vastly overreaching. Both SMCRA and UCMRA are silent on the subject of discovery. See Utah Code § 40-10-14(5); 30 U.S.C.

§ 1264(f). OSM's rules for state programs provide only that a state tribunal must have discretionary power to compel discovery. 30 C.F.R. § 775.11(b)(3)(i). The Board's discovery rule is consistent with all of this, and the Board should proceed to evaluate Sierra Club's discovery requests under its own good cause standards.

II. PETITIONERS' DISCOVERY REQUEST SHOULD BE DENIED BECAUSE IT UNJUSTLY IMPOSES UNNECESSARY BURDENS ON ALTON AND THE DIVISION

The key issue in the Board's good-cause analysis should be whether it is just and reasonable to impose additional factfinding burdens, delays, and costs on Alton and the Division. The good-cause analysis should weigh the already substantial expenditure of time and money represented by the Permit Application, the Cumulative Hydrologic Impact Assessment ("CHIA"), the various technical analysis documents, and related studies and submissions. These documents, required by law, set forth the "reasons for the decision" and the facts that Alton and Division believe will prove that granting the permit is proper under the applicable legal standards. It is neither fair nor reasonable to impose additional costs on respondent merely so Sierra Club can attempt to discover, through production of documents or depositions of witnesses, the same facts and reasons set forth in the application and related record materials. Having invested heavily in producing complete, accurate, and legally-adequate permitting documents, Respondents should not be compelled to embark upon a new, redundant factfinding effort absent a showing that information sought is absent or deficient in the materials already available.

There is no necessity for Petitioners to depose witnesses or request documents in order to avoid being surprised at hearing by Alton's technical conclusions, or the Division's reasons for

accepting them. Alton has produced an eight-volume permit application with detailed information on every subject required by the rules. The Division has prepared the CHIA and technical analyses setting forth its conclusions. Correspondence between Alton and the Division is contained in the online files. If Sierra Club is "surprised" at hearing by Respondents' analysis or explanations, it will be because they have failed to examine these materials, not because they were deprived of the opportunity to discover them. Bluntly, Petitioners should themselves shoulder the burden they ask this Board to impose on Alton and the Division, and determine for themselves whether the documents they challenge are complete, accurate, or adequate under the Rules.

The process of approving a coal mine permit is like civil litigation because it begins with a probing, often expensive inquiry into the evidence available to support or rebut conclusions that will be drawn later. The difference is that in civil litigation, discovery serves the purpose of ferreting out the evidence; in a coal mine permit, the application and technical analysis have that function. Like civil litigation, the permit review process provides opportunity, through public comment and informal conferences, for adverse parties to probe and test the evidence produced. All of this has occurred before the matter reaches the Board, which is justified in requiring a showing of good cause before repeating these steps through mandatory formal discovery.

While discovery of the Division or Alton will certainly delay a hearing on the merits, and impose additional burdens and expenses on both, it has not been shown by Sierra Club to be either fair or reasonable in light of the materials already produced. In its Memorandum supporting its discovery motions, Sierra Club produces three lists of information it contends it must discover. None of these lists show a need for the Board to order discovery. In the first list

(pages 7-8) Petitioners contend that each allegation in their Request for Review is a disputed fact requiring inquiry of either the Division or Alton. Each of the 16 elements in the list proposes to inquire of Respondents whether the Permit Application or the CHIA contains specific information. The Permit Application and CHIA are available to Sierra Club, and to the public. Rather than seek a Board order compelling Respondent to provide this information, Petitioners should shoulder their own burden and turn to the documents themselves rather than ask Respondents to do the reading for them.

In the second and third lists, Sierra Club's alleged need for discovery rests entirely on a misunderstanding of its own burden. In responding to the Request for Review, the Division alleged that allegedly missing information was in fact presented in the materials, or that it was unnecessary when other facts disclosed in the materials were considered. Sierra Club's alleged need to discover the reasons that the Division found omitted information unnecessary, or that it found other information to be sufficient, leapfrogs over its own burden to prove why the information used was insufficient. The discovery requests disclose Sierra Club's intent not to litigate the permit decision reached, but to ask the Board to rule on some other permit application that might have been prepared if other information were collected. To the extent that the discovery requests would take the hearing in that direction, they are unnecessary and should be rejected.

CONCLUSION

In sum, Alton requests the Board to deny Petitioners' Motion for Discovery for failure to demonstrate good cause where the materials and reports it seeks to discover are already disclosed and contained in the voluminous administrative record for the Coal Hollow Mine Permit. Should the Board determine that discovery must be ordered, Permittee reserves the right to object to specific discovery requests, and to propound discovery of its own against any or all of the Petitioners.

RESPECTFULLY SUBMITTED this 25th day of January, 2010.

SNELL & WILMER, LLP
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LANDRUM & SHOUSE LLP
Bennett E. Bayer (*Pro Hoc Vice)*

Attorneys for Alton Coal Development, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2010, I mailed a true and correct copy of the foregoing PERMITTEE'S MEMORANDUM OPPOSING PETITIONER'S MOTION FOR LEAVE TO CONDUCT DISCOVERY via e-mail and United States mail, postage prepaid, to the following:

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EXHIBIT A

PROCEDURAL RULES OF THE UTAH BOARD OF OIL, GAS AND MINING.

R619-100- GENERAL PROVISIONS.

R619-100-100. Scope of Rules. These rules will be known as "Rules of Practice and Procedure Before the Board of Oil, Gas and Mining" and will govern all proceedings before the Board of Oil, Gas and Mining or any hearing examiner designated by the Board. These rules provide the procedures for formal adjudicative proceedings. The rules for informal adjudicative proceedings are in the Oil and Gas Conservation Rules and the Mineral Rules.

R619-100-200. Definitions. For the purpose of these rules, the following definitions shall apply:

"Adjudicative proceeding" means a Board action or proceeding that determines the legal rights, duties, privileges, immunities , or other legal interests of one or more identifiable persons, including all Board actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and judicial review of all such actions. Those matters not governed by Title 63, Chapter 46b, Administrative Procedures Act, of the Utah Code Annotated (1953, as amended) shall not be included within this definition.

"Board" means the Utah Board of Oil, Gas and Mining. The Board shall hear all appeals of adjudicative proceedings which commenced before the Division as well as all adjudicative proceedings and other proceedings which commence before the Board. The Board may appoint a hearing examiner for its hearings in accordance with these rules. Unless the context of these rules requires otherwise, references to the Board shall be deemed to refer to the hearing examiner when so appointed.

"Division" means the Utah Division of Oil, Gas and Mining.

"Intervenor" means a person permitted to intervene in a proceeding before the Board.

"Legally Protected Interest" means the interest of any "owner" or "producer" as defined in §40-6-2 Utah Code Annotated (1953, as amended), or as defined by the rules of the Board.

"Party" means the Board, Division or other person commencing a proceeding, all respondents, all persons permitted by the Board to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in a proceeding.

"Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or other agency.

"Petitioner" means a person who requests the initiation of any proceeding (Request for Agency Action).

"Proceeding" means an adjudicative proceeding or other proceeding.

"Respondent" means any person against whom a proceeding is initiated or whose property interests may be affected by a proceeding initiated by the Board or any other person.

"Staff" means the Division staff. The Staff will have the same rights as other parties to the proceedings.

R619-100-300. Liberal Construction. These rules will be liberally construed to secure just, speedy, and economical determination of all issues presented to the Board.

R619-100-400. Deviation from Rules. When good cause appears, the Board may permit a deviation from these rules insofar as it may find compliance therewith to be impractical or unnecessary or in the furtherance of justice or the statutory purposes of the Board. Notwithstanding this, in no event may the Board permit a deviation from a rule when such rule is mandated by law.

R619-100-500. Utah Administrative Procedures Act. All rights, powers and authority described in Title 63, Chapter 46b, "Utah Administrative Procedures Act," of the Utah Code Annotated (1953, as amended), are hereby reserved to the Board. These rules shall be construed to be in compliance with the Utah Administrative Procedures Act.

R619-101- PARTIES.
R619-101-100. Division as a Party. The Division will be considered a party to a proceeding before the Board or its designated hearing examiner.

R619-101-200. Rights of Parties. Subject to such limitations as the Board will impose in the interests of conducting orderly and efficient proceedings, each party to a proceeding will be entitled to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the proceeding.

R619-102- APPEARANCES AND REPRESENTATIONS.
R619-102-100. Natural Persons. A natural person may appear on his or her own behalf and represent himself or herself at hearings before the Board.

R619-102-200. Attorneys. Except as provided in R619-102-100, representation at hearings before the Board will be by attorneys licensed to practice law in the state of Utah or attorneys licensed to practice law in another jurisdiction which meet the rules of the Utah State Bar for practicing law before the courts of the State of Utah.

R619-103- INTERVENTION.
R619-103-100. Order Granting Leave to Intervene Required. Any person, not a party, desiring to intervene in a formal proceeding will obtain an order from the Board granting leave to intervene before being allowed to participate. The hearing examiner shall not have the authority to grant a leave to intervene. Such order will be requested by means of a signed, written petition to intervene which shall be filed with the Board by the Response Date and copy promptly mailed to each party by the petitioner. Any petition to intervene or materials filed after the date a response is due under R619-105-200 may be considered at the Board's next regularly scheduled meeting only upon separate motion of the intervenor made at or before the hearing for good cause shown.

110. Content of Petition. Petitions for leave to intervene must identify the proceeding by title and by docket and cause number, to the extent determinable. The petition must contain a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceedings, or that the petitioner qualifies as an intervenor under any provision of law. Additionally, the petition shall include a statement of the relief, including the basis thereof, that the petitioner seeks from the Board.

120. Response to Petition. Any party to a proceeding in which intervention is sought may make an oral or written response to the petition for intervention. Such response will state the basis for opposition to intervention and may suggest limitations to be placed upon the intervenor if intervention is granted. The response must be presented or filed at or before the hearing.

130. Granting of Petition. The Board shall grant a petition for intervention if it determines that:

131. The petitioner's legal interests may be substantially affected by the formal adjudicative proceedings, and

132. The interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

140. Order Requirements.

141. Any order granting or denying a petition to intervene shall be in writing and sent by mail to the petitioner and each party.

142. An order permitting intervention may impose conditions on the intervenor's participation in the adjudicative proceeding that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.

143. The Board may impose conditions at any time after the intervention.

144. If it appears during the course of the proceeding that an intervenor has no direct or substantial interest in the proceeding and that the public interest does not require the intervenor's participation therein, the Board may dismiss the intervenor from the proceeding.

145. In the interest of expediting a hearing, the Board may limit the extent of participation from an intervenor. Where two or more intervenors have substantially like interests and positions, the Board may at any time during the hearing limit the number of intervenors who will be permitted to testify, cross-examine witnesses or make and argue motions and objections.

R619-104- PLEADINGS.

R619-104-100. Pleadings Enumerated. Pleadings before the Board will consist of a Notice of Agency Action, a Request for Agency Action (also referred to herein as a "petition"), responses, and motions, together with affidavits, briefs and memoranda of law and fact in support thereof.

120. Initiation. Except as otherwise permitted by R619-109-400 regarding emergency orders, all adjudicative proceedings shall be commenced by either:

121. A Notice of Agency Action, if proceedings are commenced by the Board or Division; or

122. A Request for Agency Action, if proceedings are commenced by persons other than the Board or Division.

130. Notice of or Request for Agency Action. A Notice of Agency Action and a Request for Agency Action shall be filed and served according to the following requirements:

131. Notice of Agency Action. A Notice of Agency Action shall be in writing and shall be signed on behalf of the Board if the proceedings are commenced by the Board; or by or on behalf of the Division Director if the proceedings are commenced by the Division. A Notice shall include:

131.100 The names and mailing addresses of all respondents and other persons to whom notice is being given by the Board or Division, and the name, title, and mailing address of any attorney or employee who has been designated to appear for the Board or Division;

131.200 The name of the proceeding and the file number or other reference number;

131.300 The date that the Notice of Agency Action was mailed;

131.400 A statement that such proceeding is to be conducted formally according to the provisions of these rules and Sections 63-46b-6 to 63-46b-11 of the Utah Code Annotated (1953, as amended), if applicable;

131.500 If a response is required, a statement that a written response must be filed within 20 days of the mailing date of the Notice of Agency Action;

131.600 A statement of the time and place of the hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

131.700 A statement of the legal authority and jurisdiction under which the proceeding is to be maintained;

131.800 The name, title, mailing address, and telephone number of the Board and the Division; and

131.900 A statement of the purpose of the adjudicative proceeding and, to the extent known by the Board or Division, the questions to be decided.

132. Unless Waived, the Division shall:

132.100 Mail the Notice of Agency Action to each party; and

132.200 Publish the Notice of Agency Action if required by statute or rule.

133. Persons other than the Board or Division may petition for Board action. Such request may be for rulemaking, an appeal of a Division determination in an adjudicative proceeding before the Division, a right, permit, approval, license, authority or other affirmative relief from the Board. That petitioner's Request for Agency Action shall be in writing and signed by the person invoking the jurisdiction of the Board, or by his or her attorney, and shall include:

133.100 The names and addresses of all persons to whom a copy of the Request for Agency Action is being sent;

133.200 A space for the Board's file number or other reference number;

133.300 The name of the proceeding, if known;

133.400 Certificate of mailing of the Request for Agency Action;

133.500 A statement of the legal authority and jurisdiction under which Board action is requested;

133.600 A statement of the relief sought from the Board; and

133.700 A statement of the facts and reasons forming the basis for relief.

134. Two or more grounds of complaint concerning the same subject matter may be included in one Request for Agency Action (petition) but should be numbered and stated separately. Two or more petitioners may join in one request if their respective complaints are against the same person and deal substantially with the same violation of law, rule, regulation or order of the Board.

135. A Request for Agency Action and other pleadings shall be in the form prescribed in R-619-104-200. The person requesting agency action shall file the request with the Division and shall, unless waived, send a copy by mail to each person known to have a direct interest in the requested agency action.

136. After receiving a Request for Agency Action, the Division shall, unless waived, insure that notice by mail has been given to all parties. The Division shall also provide notice by publication if required by below. The written notice shall:

136.100 Give the Board's file number or other reference number;

136.200 Give the name of the proceeding;

136.300 Designate that the proceeding is to be conducted formally according to these rules and the provisions of Sections 63-46b-6 to 63-46b-11 of the Utah Code Annotated (1953, as amended), if applicable;

136.400 If a response is required, state that a written response must be filed within twenty (20) days of the mailing or publication date of the Request for Agency Action;

136.500 State the time and place of the hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in the hearing may be held in default; and

136.600 Give the name, title, mailing address, and telephone number of the Board and Division.

137. If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the Board may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege.

140. Responses.

141. In all formal adjudicative proceedings, the respondent shall file and serve a written response signed by the respondent or his/her representative with twenty (20) days of the mailing date of the Notice of Agency Action or the Request for Agency Action that shall include:

141.100 The Board's file number or other reference number;

141.200 The name of the adjudicative proceeding;

141.300 A statement of the relief that the respondent seeks;

150. Default.

151. The Board may enter an order of default against a party if:

151.100 A party fails to attend or participate in a hearing; or

151.200 A respondent fails to file a response under R619-140 above.

152. The order shall include a statement of the ground for default and shall be mailed to all parties.

153. A defaulted party may seek to have the Board set aside the default order according to procedures outlined in the Utah Rules of Civil Procedure.

154. After issuing the order of default, the Board shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the proceeding, including those affecting the defaulting party.

160. Motions. Motions may be submitted for the Board's decision on either written or oral argument and the filing of affidavits in support or contravention thereof may be permitted. Any written motion will be accompanied by a supporting memorandum of fact and law.

170. Exhibits. Exhibits will be clearly marked to show the docket and cause numbers, the party proffering the exhibit, and the number of the exhibit.

R619-104-200. Form.

210. Request for Agency Action (petition) will contain a title which will be substantially in the following form:

BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the Matter of the
Request for Agency Action
of John Doe, Petitioner for
_____
_____

Docket No. _____
Cause No. _____

or

BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

John Doe, Petitioner,

v.

Richard Doe, Respondent.

Request for Agency Action
Docket No. _____
Cause No. _____

220. Docket and Cause Number. Upon the filing of a Request for Agency Action (petition), the secretary of the Boardwill assign a docket and a cause number to the matter. The secretary will enter the docket and cause numbers for the matter, together with the date of filing, on a separate docket provided for that purpose. Thereafter, all pleadings offered in the same proceeding will bear the docket and cause numbers assigned and will be noted with the filing date upon the docket page assigned.

230. Content and Size of Pleadings. Pleadings should be double-spaced and typed on plain, white, 8-1/2" x 11" paper. They must identify the proceeding by title and by docket and cause number, if known. All pleadings will contain a clear and concise statement of the matter relied upon as a basis for the pleading, together with an appropriate prayer for relief when relief is sought.

240. Amendments to Pleadings. The Board may, upon motion of the responsible party made at or before the hearing, allow any pleadings to be amended or corrected. Defects which do not substantially prejudice any of the parties will be disregarded.

250. Signing of Pleadings. Pleadings will be signed by the party or the party's attorney and will show the signer's address and telephone number. The signature will be deemed to be a certification by the signer that he or she has read the pleading and that, he or she has taken reasonable measures to assure its truth.

R619-105- FILING AND SERVICE.

R619-105-100. Requests for Agency Action (Petitions). All Requests for Agency Action filed by the 10th day of each calendar month may be considered by the Board for inclusion in the schedule of matters to be heard at its regularly scheduled meeting during the following calendar month. At the time the request is filed, petitioner will also file any motions, affidavits, briefs, or memoranda intended to be offered by petitioner in support of said petition or motion. Petitioner will file with the petition a list of the names and last known addresses of all persons required by statute to be served or whose legally protected interest may be affected thereby. This rule will apply to all matters initiated by the Board on its own motion as well as to statements, briefs, or memoranda in support thereof prepared by the Division or by the Staff. Any petition or other materials filed after the 10th day of any calendar month may be considered by the Board at its regularly scheduled meeting during the following month only upon separate motion of petitioner made at or before the hearing for good cause shown.

R619-105-200. Responses.

210. All responses to petitions, responses to motions by petitioner, and motions by respondent, together with all affidavits, briefs, or memoranda in support thereof, filed by the 10th day of the month or two weeks before the scheduled hearing, whichever is earlier, in the month in which the hearing on the matter is scheduled (the "Response Date") may be considered by the Board at its regularly scheduled meeting during that month. This rule will apply to all statements, briefs, or memoranda prepared by the Division or by the Staff in response to any petition or motion by petitioner. Any responses or other materials filed after the Response Date may be considered at the Board's regularly scheduled meeting for that month only upon separate motion of respondent made at or before the hearing for good cause shown.

R619-105-300. Motions. All motions or responses to motions available to a petitioner or respondent at the time his or her Request for Agency Action or response is filed will be filed and served with the petition or response as provided in R619-105-100 and R619-105-200. Subsequent written motions, other than motions for exceptions to the filing requirements of these rules, must be filed by the time the response is due under R619-105-200. Oral responses and written responses to motions may be presented or filed at or before the hearing. Oral motions and responses to oral motions may be presented at the hearing.

R619-105-500. Exhibits. Any exhibits intended to be offered by petitioners, respondents, and intervenors in support of matters set forth in their respective pleadings will be filed with the secretary of the Board on or before the time the response is due under R619-105-200. Any exhibits filed by any party after the Response Date, but prior to the close of business two days before the hearing, may be considered by the Board at the hearing, but in such event the Staff will have the right to request a continuance of the proceedings until the next regularly scheduled meeting of the Board or hearing date of the hearings examiner. Any exhibits filed by any party after the close of business two days prior to the hearing, but before the hearing, may be considered by the Board at the hearing only upon separate motion of the party offering the exhibit made at the hearing for good cause shown. Any exhibits intended to be offered by the parties in rebuttal of evidence presented at the hearing will be presented at the hearing. The Board, on its own motion, may order the continuance of any proceeding until the next regularly scheduled meeting of the Board in order to allow adequate time for the Staff to evaluate any evidence presented during the hearing.

R619-105-600. Place of Filing. An original and 12 copies of all pleadings, affidavits, briefs, memoranda and exhibits will be filed with the secretary of the Board. The Board may direct any party to provide additional copies as needed.

R619-105-700. Temporary Procedural Rulings. The Chairman or designated Acting Chairman of the Board may issue temporary rulings on procedural motions that arise between Board hearings dates. These rulings will be reviewed and decided upon by the Board at its next regularly scheduled meeting.

R619-105-800. Computation of Time. In computing any period of time prescribed or allowed by these rules, or by the Board, the day of the act, event, or default from which the designated period of time begins to run will not be included. The last day of the period so computed will be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intervening Saturdays, Sundays, or legal holidays will be excluded in the computation.

R619-106- NOTICE AND SERVICE.

R619-106-100. Notice. Except as otherwise provided by law, before any rule, regulation, or order, or amendment thereof, will be made by the Board, notice of a hearing thereon will be given by publication in a newspaper of general circulation in the city of Salt Lake and county of Salt Lake, Utah, and in any newspapers of general circulation published in the county where the land affected or some part thereof is situated. Such notice will be issued in the name of the state and will be signed by the Board or its secretary. The notice will specify the title and docket and cause numbers of the proceeding, the time and place of hearing and whether the case is set for hearing before the Board or its designated hearing examiner. The notice will briefly state the purpose of the proceeding and general nature of the order, rule, or regulation to be promulgated or effected. The notice will also state the name(s) of the petitioner and respondent, if any, and, unless the order, rule, or regulation is intended to apply to and affect the entire state, the notice will specify the land or resource affected by such order, rule, or regulation. In addition to published notice, the Board will give notice by mail to all parties. Such notice will be given by the 1st day of the month in which the hearing is held, but in no event less than fifteen days before the hearing.

R619-106-200. Personal Service of Request (Petition) and Related Pleadings.

210. In addition to the notice required by R619-106-100, wherever personal service is required by applicable law, the petitioner, or the Board in any proceeding initiated by the Board, will personally serve a copy of the petition and all pleadings filed with the secretary of the Board at the same time as the petition, other than exhibits, on any person required by statute to be served and on any respondent. The Board, on its own motion, may at any time also require petitioner to effect personal service on any other person whose legally protected interests may, in the opinion of the Board, be affected by the proceedings. In such event the Board will prescribe the schedule for service of the request and any response thereto.

220. Personal service under this rule will be accomplished no later than the 15th day of the month preceding the month in which the first hearing in the matter is held.

230. Personal service may be made by any person authorized by law to serve summons in the same manner and extent as is provided by the Utah Rules of Civil Procedure for the service of summons in civil actions in the district courts in this state. Proof of service will be in the form required by law with respect to service of process in civil actions. Persons otherwise entitled to personal service under these rules may be served by publication or mail in accordance with Rule 4(f) of the Utah Rules of Civil Procedure. In such a case, any member of the Board may consider ex parte and rule upon the verified motion of any person seeking to accomplish service by publication or mail.

R619-106-300. Service of Other Pleadings. A copy of all pleadings filed subsequent to the Request for Agency Action or Notice of Agency Action, which are not required to be personally served pursuant to R619-106-200, will be served by mailing a copy thereof, postage prepaid, to all parties at the same time such pleadings are filed with the secretary of the Board. Exhibits need not be served on all parties, but may be examined by any party during the normal business hours of the Division by arrangement with the secretary of the Board.

R619-106-400. Service on Attorney or Representative. When any party has appeared by attorney or other authorized representative, service upon such attorney or representative constitutes service upon the party he or she represents.

R619-106-500. Proof of Service. There will appear on all documents required to be served a certificate of service in substantially the following form:

> I hereby certify that I have this day served the foregoing instrument upon all parties of record in this proceeding (by delivering a copy thereof in person to _____) (by mailing a copy thereof, properly addressed, with postage prepaid, to _____).
>
> Dated at _____, _____ this _____ day of _____, 19____.
>
> _____
> Signature
>
> or
>
> I hereby certify that I have this day served the foregoing document by publication of a notice thereof in the (name of newspaper), a newspaper of general circulation in Salt Lake City and County and in (name of newspaper[s]), (a) newspaper[s] of general circulation in the County of _____. Copies of the notices are attached to this certification.
>
> Dated at _____, _____ this _____ day of _____, 19____.
>
> _____
> Signature

R619-106-600. Additional Notices Upon Request. Any person desiring notification by mail from the Board or the Division of all matters before the Board will request the same in writing by filing with the Board or Division his or her name and address and designating the area or areas in which he or she has an interest and in which he or she desires to receive such notice. The Division may designate an annual fee, payable in advance, for such notice.

R619-106-700. Continuance of Hearing Without New Service. Any hearing before the Board held after due notice may be continued by the person presiding at such hearing to a specified time and place without the necessity of notice of the same being again served or published. In the event of any continuance, a statement thereof will be made in the record of the hearing which is continued. If a hearing (not the deliberation or decision) is continued indefinitely, the Board will provide new notice in accordance with these rules before hearing the matter.

R619-107- PREHEARING CONFERENCE.

R619-107-100. Conference. The Board, may in its discretion, on its own motion or motion of one of the parties made on or before the date the response is due, direct the parties or their representatives to appear at a specified time and place for a prehearing conference. At the conference, consideration will be given to:

110. Simplification or formulation of the issues;

120. The possibility of obtaining stipulations, admissions of facts, and agreements to the introduction of documents;

130. Limitation of the number of expert witnesses;

140. Arranging for the exchange of proposed exhibits or prepared expert testimony; and

150. Any other matters which may expedite the proceeding.

R619-107-200. Order. The Board will issue an order based upon its own findings or upon the recommendation of its designated hearing examiner, which recites the action taken at the conference and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements. Such order will control the subsequent course of the proceeding before the Board unless modified by subsequent order for good cause shown.

R619-108- CONDUCT OF HEARINGS. Except as may otherwise be provided by law, hearings before the Board will be conducted as follows:

R619-108-100. Public Hearings. All hearings before the Board will be open to the public, unless otherwise ordered by the Board for good cause shown. All hearings shall be open to all parties.

101. Full Disclosure. The Board shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

R619-108-200. Rules of Evidence. The Board shall use as appropriate guides the Utah Rules of Evidence insofar as the same may be applicable and not inconsistent with these rules. Notwithstanding this, on its own motion or upon objections of a party, the Board:

201. May exclude evidence that is irrelevant, immaterial, or unduly repetitious.

202. Shall exclude evidence privileged in the courts of Utah.

203. May receive documentary evidence in the form of a copy of excerpt if the copy or excerpt contains all pertinent portions of the original document.

204. May take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record or other proceedings before the Board, and of technical or scientific facts within the Board's specialized knowledge.

R619-108-300. Testimony. Testimony presented to the Board in a hearing will be sworn testimony under oath or affirmation.

R619-108-400. Failure to Appear. When a party to a proceeding fails to appear at a hearing after due notice has been given, the Board may dismiss or continue the matter or decide the matter against the interest of the party who fails to appear.

R619-108-500. Order of Presentation of Evidence. Unless otherwise directed by the Board at the hearing, the order of procedure and presentation of evidence will be as follows:

510. Hearings upon Petition:
511. Petitioner
512. Respondent, if any
513. Staff
514. Intervenors
515. Rebuttal by Petitioner
520. Hearings upon motion of the Board:
521. Staff
522. Respondent
523. Rebuttal by Staff

R619-108-600. Oral Argument and Briefs. Upon the conclusion of the taking of evidence, the Board may, in its discretion, permit the parties to make oral arguments or submit additional briefs or memoranda upon a schedule to be designated by the Board.

R619-108-700. Record of Hearing. The Board will cause an official record of the proceedings to be made in all hearings as follows:

710. The record may be made by means of a certified shorthand reporter employed by the Board or by a party desiring to employ a certified shorthand reporter at its own cost in the event that the Board chooses not to employ the reporter. If a party employs a certified shorthand reporter, the original transcript of the hearing will be filed with the Board. Parties desiring a copy of the certified shorthand reporter's transcript may purchase it from the reporter.

720. The record of the proceedings may also be made by means of a tape recorder or other recording device if the Board determines that it is unnecessary or impracticable to employ a certified shorthand reporter and the parties do not desire to employ a certified shorthand reporter.

730. If the Board deems it unnecessary, it will not have the record of a hearing transcribed unless requested to do so by a party. Whenever a transcript or tape recording of a hearing is made, it will be available at the office of the Board for the use of the parties, but may not be withdrawn therefrom.

R619-108-800. Summons and Fees.

810. Summons. The Board may issue summons on its own motion or upon request of a party for the attendance of witnesses and the production of any pertinent paper, book, record, document, or other evidence.

820. Witness Fees. Each witness who appears before the Board will be entitled to receive the same fees and mileage allowed by law to witnesses in a district court, which amount will be paid by the party at whose request the witness is subpoenaed. Witnesses appearing at the request of the Board will be paid from the funds appropriated for the use of the Board. Any witness summoned by a party other than the Board may, at the time of service of the summons, demand one day's witness fee and mileage in advance and unless such fee is tendered, the witness will not be required to appear.

R619-108-900. Discovery. Upon the motion of a party and for good cause shown, the Board may authorize such manner of discovery against another party, including the Division or the Staff, as may be prescribed by and in the manner provided by the Utah Rules of Civil Procedure.

R619-109- DECISIONS AND ORDERS.

R619-109-100. Board Decision. Upon reaching a final decision in any proceeding, the Board will prepare a decision to include findings of fact, conclusions of law, and an order. The Board may direct the prevailing party to prepare proposed findings of fact, conclusions of law, and an order, which will be completed within five days of the direction, unless otherwise instructed by the Board. Copies of the proposed findings of fact, conclusions of law, and order will be served by the prevailing party upon all parties of record before being presented to the Board for signature. Notice of objection thereto will be submitted to the Board and all parties of record within five days after service.

R619-109-200. Entry of Order. The Chairman or designated Acting Chairman of the Board will sign the order on any matter no later than 30 days following the end of the hearing on that matter, and cause the same to be entered and indexed in books kept for that purpose. The order will be effective on the date it is signed, unless otherwise provided in the order. Upon petition of a person subject to the order and for good cause shown, the Board may extend the time for compliance fixed in its order.

R619-109-300. Notice. The Board will notify all parties to the proceeding of its decision. A copy of the order with accompanying findings of fact and conclusions of law will be delivered or mailed to each party.

R619-109-400. Emergency Orders. Notwithstanding the other provisions of these regulations, the Director of the Division or any member of the Board is authorized to issue an emergency order without notice or hearing, in accordance with the applicable statute. The emergency order will remain in effect no longer than until the next regular meeting of the Board, or such shorter period of time as will be prescribed by statute.

R619-110- REHEARING AND MODIFICATION OF EXISTING ORDERS.

R619-110-100. Time for filing. Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

R619-110-200. Contents of Petition. A petition for rehearing will set forth specifically the particulars in which it is claimed the Board's order or decision is unlawful, unreasonable, or unfair. If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence. If the petition is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing.

R619-110-300. Response to Petition. All other parties to the proceeding upon which a rehearing is sought may file a response to the petition at any time prior to the hearing at which the petition will be considered by the Board. Such responses will be served on the petitioner at or before the hearing.

R619-110-400. Action on the Petition. The Board will act upon the petition for a rehearing at its next regularly scheduled meeting following the date of its filing. If no action is taken by the Board within such time, the petition will be deemed to be denied. The Board may set a time for a hearing on said petition or may summarily grant or deny the petition.

R619-110-500. Modification of Existing Orders. A request for modification or amendment of an existing order of the Board will be treated as a new petition for purposes of these rules.

R619-111- DECLARATORY RULINGS.

R619-111-100. Petition for Declaratory Rulings. Any person may by a Request for Agency Action filed in accordance with these rules, petition the Board for a declaratory ruling on the applicability of any statute, rule, regulation or order to the operations or activities of that person. The petition will include the questions and answers sought and reasons in support of or in opposition to the applicability of the statute or rule or regulation involved.

R619-111-200. Ruling. The Board will consider the petition, and will:

210. Notify the person that no declaratory ruling will be issued;

220. Issue a nonbinding declaratory ruling; or

230. Decide that a binding declaratory ruling affecting the petitioner or any other person may be proper, and initiate a proceeding under R619-104- which will be conducted according to these rules.

R619-112- RULEMAKING.

R619-112-100. Scope of Rulemaking. The Board will promulgate such procedural and substantive rules as it deems useful or necessary to implement its statutory duties or fulfill its statutory obligations, or to interpret the statutory authority under which it operates.

R619-112-200. Promulgation of Rules. Rules will be promulgated by the procedure specified, and incorporated herein by reference, in the "Utah Administrative Rulemaking Act," U.C.A. Section 63-46a-1 et seq. (1953, as amended).

R619-113- HEARING EXAMINERS.

R619-113-100. Designation of Hearing Examiner. The Board may, in its discretion, on its own motion or motion of one of the parties, designate a hearing examiner for purposes of taking evidence and recommending findings of fact and conclusions of law to the Board. Any member of the Board, Division Staff, or any other person designated by the Board may serve as a hearing examiner.

R619-113-200. Powers. The order appointing a hearing examiner may specify or limit the hearing examiner's powers and may direct the hearing examiner to report only upon particular issues; to do or perform particular acts or to receive and report evidence only; and to fix the time and place for beginning and closing the hearing and for filing a report. Unless the hearing examiner's authority is limited, the hearing examiner will be vested with general authority to conduct hearings in an orderly and judicial matter, including authority to:

210. Summon and subpoena witnesses;

220. Administer oaths, call and question witnesses;

230. Require the production of records, books and documents;

240. Take such other action in connection with the hearing as may be prescribed by the Board in referring the case for hearing;

250. Make evidentiary rulings and propose findings of fact and conclusions of law; and

R619-113-300. Conduct of Hearings. Except as limited by the Board's order, hearings will be conducted under the same rules and in the same manner as hearings before the Board, as more fully described in R619-108-.

R619-113-400. Rules, Findings, and Conclusions of Hearing Examiner. During the hearing, objections to evidence will be ruled upon by the hearing examiner. Where a ruling sustains objections to an admission of evidence, the party affected may insert in the record, as a tender of proof, a summary written statement of the evidence excluded and the objecting party may then make an offer of proof in rebuttal. Upon completion of the hearing, the hearing examiner will prepare a written summary of all such rulings and will make proposed findings of fact and conclusions of law in a proposed order in conformance with R619-109. All such proposed rulings, findings, and conclusions will be distributed to the parties and filed with the Board.

R619-113-500. Board Final Order. No later than the 10th day of the month following filing of the proposed rulings, findings, and conclusions by the hearing examiner, any party may file with the Board such briefs or statements as they may desire regarding the proposals made by the hearing examiner, but no party will offer additional evidence without good cause shown and an accompanying request for de novo hearing before the Board. The Board will then consider the hearing examiner's proposedrulings, findings, and conclusions and such additional materials as filed by the parties and may accept, reject, or modify such proposed rulings, findings, and conclusions in whole or in part or may remand the case to the hearing examiner for further proceedings, or the Board may set aside the proposed ruling, findings, and conclusions of the hearing examiner and grant a de novo hearing before the Board. If a Board member acted as the hearing examiner, then said Board member will not participate in the Board's determination.

R619-114 Exhaustion of Administrative Remedies.
R19-114-100. Requirement. Persons must exhaust their administrative remedies in accordance with Section 63-46b-14, Utah Code Annotated (1953, as amended), prior to seeking judicial review.
200. Informal Adjudicative Proceedings before the Division. In any informal proceeding before the Division, there is an opportunity given to request an informal hearing before the Division. If a timely request is made, the Division will conduct an informal hearing and issue a decision thereafter. Only those aggrieved parties that participated in any hearing or an applicant who is aggrieved by a denial or an approval with conditions will then be entitled to appeal such Division decision to the Board within ten (10) days of issuance of the Division order. Such appeal shall be treated as a contested case which is processed as a formal proceeding under these rules. Such rights to request an informal hearing before the Division or to appeal the Division order and have the matter be contested and processed "formally" are available and adequate administrative remedies and should be exercised prior to seeking judicial review.

300. Formal Adjudicative Proceedings. In any formal adjudicative proceeding before the Board, there is an opportunity for affected parties to respond and participate. Only those aggrieved parties that so exhausted these available and adequate remedies before the Board may be allowed to seek judicial review of the final Board action.

R619-115 Deadline for Judicial Review.
R19-115-100. Filing. A party shall file a petition for judicial review of final Board action within 30 days after the date that the order constituting the final Board action is issued. The petition shall name the Board and all other appropriate parties as respondents and shall meet the form requirements specified in Title 63, chapter 46b of the Utah code annotated (1953, as amended).

R619-116 Judicial Review of Formal Adjudicative Proceedings.
R619-116.110 Judicial review of formal adjudicative proceedings shall be conducted in conformance with Sections 63-46b-16 through 63-46b-18 of the Utah Code Annotated (1953, as amended).

R619-117 Civil Enforcement.
R619-117-100. Agency Action. In addition to other remedies provided by law and other rules of this Board, the Board or Division may seek enforcement of an order by seeking civil enforcement in the district courts subject to the following:
110. The action seeking civil enforcement must name, as defendants, each alleged violator against whom civil enforcement is sought.
120. Venue for an action seeking civil enforcement shall be determined by the Utah Rules of Civil Procedure.
130. The action may request, and the court may grant, any of the following:
131. declaratory relief;
132. temporary or permanent injunctive relief;
133. any other civil remedy provided by law; or
134. any combination of the foregoing.
200. Individual Action. Any person whose interests are directly impaired or threatened by the failure of an agency to enforce its order may timely file a complaint seeking civil enforcement of that order. The complaint must name as defendants, the agency whose order is sought to be enforced, the agency that is vested with the power to enforce the order, and each alleged violator against whom the plaintiff seeks civil enforcement. The action may not be commenced:
210. Until at least 30 days after the plaintiff has given notice of its intent to seek civil enforcement of the alleged violation to the Board, the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement;
220. If the Board or Division has filed and is diligently prosecuting a complaint seeking civil enforcement of the same order against the same or similarly situated defendant; or

230. If a petition for judicial review of the same order has been filed and is pending in court.

R619-118 Waivers.

Notwithstanding any other provision of these rules, any procedural matter, including any right to notice or hearing, may be waived by the affected person(s) by a signed, written waiver in a form acceptable to the Division.

R619-119 Severability.

In the event that any provision, section, subsection or phrase of these rules is determined by a court or body of competent jurisdiction to be invalid, unconstitutional, or unenforceable, the remaining provisions, sections, subsections or phrases shall remain in full force and effect.

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et seq.

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to an alleged violation reported to the regulatory authority by the private person.

(c) The permittee shall conduct surface coal mining and reclamation operations only on those lands specifically designated on the maps submitted under 30 CFR 779-780 or 783-784 and approved for the term of the permit and which are subject to the performance bond or other equivalent guarantee in effect pursuant to Subchapter J.

§ 786.29 Conditions of permits: Environment, public health, and safety.

Each permit issued by the regulatory authority shall ensure and contain specific conditions requiring that the—

(a) Permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit, including, but not limited to:

(1) Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance;

(2) Immediate implementation of measures necessary to comply; and

(3) Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(b) The permittee shall dispose of solids, sludge, filter backwash, or pollutants removed in the course of treatment or control of waters or emissions to the air in the manner required by Subchapter K of this Chapter, the regulatory program, and which prevents violation of any other applicable State or Federal law.

(c) The permittee shall conduct its operations—

(1) In accordance with any measures specified in the permit as necessary to prevent significant, imminent environmental harm to the health or safety of the public; and,

(2) Utilizing any methods specified in the permit by the regulatory authority in approving alternative methods of compliance with the performance standards of the Act and the regulatory program, in accordance with the provisions of the Act, 30 CFR 786.19(m), and Subchapter K.

PART 787—ADMINISTRATIVE AND JUDICIAL REVIEW OF DECISIONS BY REGULATORY AUTHORITY ON PERMIT APPLICATIONS

Sec.
787.1 Scope.
787.2 Objectives.
787.11 Administrative review.
787.12 Judicial review.

AUTHORITY: Secs. 102, 201, 501, 503, 504, 505, 511, 512, 514, and 526, Pub. L. 95-87 (30 U.S.C. Sections 1202, 1211, 1251, 1253, 1254, 1256, 1261, 1263, 1264 and 1276).

§ 787.1 Scope.

This Part provides the minimum requirements for the Secretary's approval of regulatory program provisions for administrative and judicial review of coal exploration approval applications and permit decisions by the regulatory authority, or the failure of the regulatory authority to act on applications for coal exploration approval or permits.

§ 787.2 Objectives.

The objectives of this Part are to provide for timely and thorough review by administrative and judicial bodies under regulatory programs on decisions of and failures to act by regulatory authorities under this Subchapter.

§ 787.11 Administrative review.

(a) Within 30 days after the applicant or permittee is notified of the final decision of the regulatory authority concerning the application for a permit, revision or renewal thereof, permit, application for transfer, sale, or assignment of rights, or concerning an application for coal exploration under 30 CFR 776.14, the applicant, permittee or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final decision in accordance with this Section.

(b) *State programs.*

(1) The regulatory authority shall commence the hearing within 30 days of such request. This hearing shall be of record, adjudicatory in nature, and no person who presided at an informal conference under 30 CFR 786.14 shall either preside at the hearing, or participate in the decision following the hearing, or in any administrative appeal therefrom.

(2) The regulatory authority may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate, pending final determination of the proceeding, if:

(i) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(ii) The person requesting that relief shows that there is a substantial likelihood that he or she will prevail on the merits of the final determination of the proceeding; and

(iii) The relief is not to affect adversely the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources; and

(iv) The relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the regulatory authority.

(3)(i) For the purpose of such hearing, the hearing authority may administer oaths and affirmations, subpoena witnesses written, or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations.

(ii) A verbatim record of each public hearing required by this Section shall be made, and a transcript made available on the motion of any party or by order of the hearing authority.

(iii) Ex parte contacts between representatives of the parties before the hearing authority and the hearing authority shall be prohibited.

(4) Within 30 days after the close of the record, the hearing authority shall issue and furnish the applicant, and each person who participated in the hearing, with the written findings of fact, conclusions of law, and order of the hearing authority with respect to the appeal.

(5) The burden of proof at such hearings shall be on the party seeking to reverse the decision of the regulatory authority.

(c) *Federal and Federal Lands Programs.*

All hearings on applications for permits, revisions, renewals thereof, permits, applications for transfer, sale or assignment of rights granted under permits, and applications for coal exploration approval shall be of record and governed by 5 U.S.C. Section 554 and 43 CFR Part 4.

§ 787.12 Judicial review.

(a) Any applicant or any person with an interest which is or may be adversely affected and who has participated in the administrative proceedings as an objector shall have the right to appeal as provided in Paragraph (b) of this Section, if—

(1) The applicant or person is aggrieved by the decision of the hearing authority in an administrative review proceeding conducted pursuant to Section 787.11,; or,

(2) Either the regulatory authority or the hearing authority for administrative review under Section 787.11 fails to act within time limits specified in the Act, this Subchapter, or the regulatory program, whichever applies.

(b) (1) *State programs.* Action of the regulatory authority or hearing authority identified in Paragraph (a) of this Section shall be subject to judicial review by a court of competent jurisdiction, as provided for in the State program, but the availability of such